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OCTOBER TERM, 1975

No. 75-106

IN RE: PETITION OF
CHARLES FREDERICK HARDY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

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IN RE: PETITION OF
CHARLES FREDERICK HARDY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, GARY JAMES KNOSTMAN, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered on April 18, 1975 denying Petitioner's petition for Writ of Certiorari to the Fourth District Court of Appeal of Florida. The decision of the Fourth District Court of Appeal of Florida dated August 2, 1974 affirmed the trial court's order of adoption. Rehearing was denied by the Fourth District Court of Appeal of Florida on September 12, 1974.

OPINIONS BELOW

The Supreme Court of Florida's denial of a Writ of Certiorari to the Fourth District Court of Appeal of Florida is reported at 312 So.2d 751 and is reproduced in the Appendix to the Petition. The decision of the District Court of Appeal of Florida, Fourth District, affirming the trial court's judgment is reported at 299 So.2d 172, and reproduced in the Appendix to the Petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code.

QUESTION PRESENTED

Whether in a bitterly contested, stepparent adoption proceeding wherein a child's rights and relationship to his natural parent may be permanently severed, Fourteenth Amendment due process of law requires that the Court appoint a law guardian *ad litem* to represent the best interests of the child independently of the interests of other parties to the adoption.

CONSTITUTIONAL PROVISION INVOLVED

This case presents a question concerning the application of the due process clause of the Fourteenth Amendment to the United States Constitution. Section 1 of the Fourteenth Amendment provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves an adoption by a stepfather which is vigorously contested by the Petitioner who is the natural father of the children who are the subjects of this adoption proceeding. Petitioner was divorced from the natural mother in October, 1970, and the mother remarried in December of 1970. The mother's new husband, CHARLES FREDERICK HARDY, filed a petition in the Circuit Court

for Broward County, Florida to adopt the two natural children of this Petitioner, GARY JAMES KNOSTMAN. At the time of the trial, the children were ages six (6) and three (3).

The case went to trial on June 4, 1973 and resulted in the trial court entering a final judgment of adoption on a finding that the adoption would be in the best interests of the minor children.

At this final hearing, the natural mother's new husband, CHARLES FREDERICK HARDY, respondent herein, was represented by competent counsel. Petitioner appeared *without counsel* and represented *himself*. The minor children, though clearly the subject of the litigation, did not appear before the Court nor were they represented by counsel. The children did not testify, and their interests were not made known to the Court except through the testimony of Petitioner's ex-wife and her new husband. No social investigation of any kind was made or ordered by the Court in an effort to determine where the best interests of the minor children might lie. The only testimony before the Court was that of the respondent, CHARLES HARDY, his wife, who is the ex-wife of the Petitioner, his mother-in-law and the Petitioner. Neither Petitioner nor Respondent moved the Court to protect the children's best interests by appointing a law guardian *ad litem* to represent the minor children. The trial judge himself did not on his own motion, appoint a law guardian *ad litem* to independently represent the children's best interests. Although counsel for Respondent Hardy suggested that the Court might wish to order a social investigation to which no one objected, no such investigation into the circumstances of the parties and the best interests of the children was had, although the Court observed at the close of testimony, "This is not a good and clear-cut case for a judge."

Thus, at the trial level, the record reflects that no one raised the issue of protecting the children's best interests by appointment of a law guardian *ad litem*. These young children, the subjects of the litigation, were certainly in no position to raise the issue of appointment of a law guardian *ad litem*. The testimony at trial was clear to the effect that granting or denying the petition for adoption would not change the custody of the children which was with Mrs. Hardy, but granting it would only terminate the parental relationship of the children with their father. Copy of "Final Judgment of Adoption" is reproduced in the Appendix to the Petition.

The Petitioner, through a Texas lawyer, sought review of the final judgment of adoption in the Fourth District Court of Appeal of Florida challenging the trial court's judgment ordering the adoption. The Fourth District Court of Appeal of Florida affirmed on August 2, 1974. Petition for rehearing was denied September 12, 1974. Petitioner, through other counsel, then petitioned the Supreme Court of Florida for Writ of Certiorari which was denied on April 18, 1975.

The Petitioner herein, in his appeal to the Fourth District Court of Appeal of Florida, properly assigned as error the trial court's failure to clearly find that the adoption was in the children's best interests. Again, on petition for rehearing before the Fourth District Court of Appeal of Florida, the Petitioner argued that the children's interests were not protected as the trial court never appointed a guardian *ad litem* in the adoption matter nor in any way sought to protect and represent the children's best interests.

This petition will show that such an omission by the trial judge amounted to plain or fundamental error and resulted in the deprivation of the children's Fourteenth Amendment rights to life, liberty and property without due process of law.

REASONS FOR GRANTING THE WRIT

The issue of appointment of a law guardian *ad litem* was raised for the first time before the Fourth District Court of Appeal at which time Petitioner was first represented by counsel. The issue of independent counsel for the children who were the subjects of the adoption proceeding *could not* have been raised by these children of such tender years, ages six (6) and three (3). It was the duty of the trial judge, by his own motion, to protect the children's best interests by appointment of a law guardian *ad litem*. In any event, the deprivation of these children's constitutional right to representation may be considered by the court under the doctrine of plain or fundamental error. *U. S.* v. *Atkinson*, 297 U.S. 157, 56 S.Ct. 391; *Johnson* v. *U. S.*, 318 U.S. 189, 63 S.Ct 549; *Screws* v. *U. S.*, 325 U.S. 91, 55 S.Ct. 1031; *Silber* v. *U. S.*, 370 U.S. 717, 82 S.Ct. 1287; and *Hormel* v. *Helvering*, 312 U.S. 552, 61 S.Ct. 719.

In the case of *In Re*: *Gault*, 387 U.S. 1, 87 S.Ct. 428, this Honorable Court recognized that children have constitutional rights in juvenile proceedings. The Court held:

> "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and its parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." 387 U.S. at 41, 87 S.Ct. at 451.

In addition, *Gault* rejected the former distinction between due process rights in civil proceedings and due process rights in criminal proceedings. Although traditionally

juvenile proceedings were labelled "civil" in nature, such a label did not operate to foreclose the application of basic due process safeguards in *Gault*. Rather than interpret and analyze labels, this Court chose to look toward the nature and seriousness of the proceedings and resulting deprivation.

In the aftermath of *Gault, supra,* many states have enacted legislation expanding the holding of *Gault* to provide counsel for children in proceedings involving delinquency, neglect, and termination of parental rights.[1]

In *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 1966, this Court disregarded the fact that a Pennsylvania Statute declared that the Statute was of a "civil character" rather than a penal-type statute. In looking to the effect of the statute, this Court, speaking through Mr. Justice Black, stated:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any State deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label the State chooses to fasten upon its conduct or its statute." 382 U.S. at 401, 86 S.Ct. at 520.

In *In Re*: *Winship,* 397 U.S. 358, 90 S.Ct. 1068, this Court, in approving *Gault,* again recognized the importance of disregarding "criminal-civil" labels when the issue is the application of basic due process requirements. This Court stated:

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1. Conn. Gen. Stat. Ann., Sec. 17-66 b, c (Supp. 1974); Ill. Ann. Stat., Chap. 37, Sec. 701-20 (Supp. 1974); Kan. Stat. Ann., Sec. 38-821 (1973); Minn. Stat. Ann., Sec. 260.155 (1971); N.Y. Family Ct. Act, Sec. 249 (McKinney 1974); N.D. Cent. Code, Sec. 27-20-26 (1974); Ohio Rev. Code Ann., Sec. 2151.352 (Supp. 1973); Okla. Stat. Ann., Title 10, Sec. 1109 (Supp. 1972), Uniform Juvenile Court Act, Sec. 26 (1968).

> "We made clear in that decision (*Gault, supra*) that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts. . ." 397 U.S. at 365-366, 90 S.Ct. at 1073.

This Court also stated:

> "The same considerations that demand extreme caution in *fact finding* to protect the innocent adult apply as well to the innocent child." (Emphasis added.) 397 U.S. at 365, 90 S.Ct. at 1073.

Fact finding is indeed the crux of this Petition. Florida law is clear to the effect that the best interests of the child are of paramount consideration in adoption proceedings. *Steets* v. *Gammarino,* 59 So.2d 520, Fla. 1952; *Modacsi* v. *Taylor,* 104 So.2d 664, 1 D.C.A., Fla. 1958; *Meyers* v. *Shifrin,* 146 So.2d 770, 3 D.C.A., Fla. 1962; *Clements* v. *Banks,* 159 So.2d 892, 3 D.C.A., Fla. 1964. The rights of a parent have to yield to the welfare and best interests of the minor child. *Hamilton* v. *Rose,* 99 So.2d 234, Fla. 1957.

> "A natural parent may submit to an adoption by giving consent. He may so conduct himself as to show a complete abandonment. But, absent the two criteria cited supra, it takes a mighty clear and convincing set of facts before the privileges and responsibilities of the father can be taken away from him." *LaFollette* v. *Van Weelden,* Fla. App. 1975, 309 So.2d 197; *Torres* v. *Van Eepoel,* Fla. 1957, 98 So.2d 735; *Roy* v. *Holmes,* Fla. App. 1959, 111 So.2d 468; *In Re*: *Adoption of Shaw,* Fla. App. 1967, 198 So.2d 87.

This being the State of Florida Jurisprudence in the area of adoption proceedings, the Court, in the interest of justice, must then determine what indeed are the child's best interests.

In protecting the child's interests, the Court must look to the seriousness of the adoption proceedings. Adoption, unlike custody, results in the total and final extinguishment of the right of a natural parent to his child and the right of the child to his relationship with his natural parent. As stated by the Court in *In Re*: *Adoption of Children*, 96 N.J.Super. 415, 233 A.2d 188 at 192, Super. Ct. 1967:

> "The distinction between custody and adoption has had universal acceptance throughout the literature and law of filial relations. When custody is at issue the court is much more likely to make the temporary grant, always subject to reconsideration, on the basis of the best welfare of the child in light of the advantages and opportunities offered by the competing parties. Deeper and broader considerations, however, are commanded in adoption proceedings where the parent-child relationship is sought to be permanently severed. (Citations omitted.) As stated by the Supreme Court of New Mexico, adoption should be undertaken only with 'the most adequate safeguards against abuse'. *Barwin* v. *Reidy*, 62 N.M. 183, 307 P.2d 175, 180 (1957)."

The Court continued:

> "The name of an adopted child and his right of inheritance are changed and the biological ties with his parents are forever foreclosed by a judgment of adoption. Such an action is of the first magnitude and should be sanctioned only after serious consideration of the consequences. Note, 16 RUTGERS L. REV., op. cit., at pp. 390-391. The child's relationship with a parent is of such significance that all doubt should be resolved against its destruction. (Citations omitted.) A child, however, is not a chattel, and the parent-offspring relationship is a status, not a contract, which status

> may be altered or abrogated by the State as *parens patriae* in furtherance of a societal concern for the protection of the child's best interests—the dominant objective to be achieved." 233 A.2d at 193.

It has been suggested that a "gravity of consequences" standard be used as a guide in making the aid of counsel a constitutional requirement in so-called "civil" cases. See note, THE RIGHT TO COUNSEL IN CIVIL LITIGATION, 66 Colum. L.Rev., 1322, 1332, 1966. Indeed there is merit in a standard that examines the severity of a potential penalty or deprivation. Certainly the child who forever loses his right to his relationship with his natural parent may well suffer a more crippling blow than a criminal who serves a jail sentence.

The United States Court of Appeals, Tenth Circuit, in light of *Gault*, has seen fit to disregard the civil-criminal distinction. See *Heryford* v. *Parker*, 396 F.2d 393, 1968. Instead, the court chose to look to the gravity of the rights at stake in deciding to observe the constitutional safeguards of due process.

In *May* v. *Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 1952, this Court described a mother's right to the custody of her children as being "far more precious . . . than property rights." In *May*, the Court held that an ex parte divorce proceeding in Wisconsin awarding custody to the father did not deserve full faith and credit in Ohio. *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 1972, also required a fair due process hearing before the father of an illegitimate child is deprived of parental rights upon the death of the mother, overruling a law presuming the father's unfitness for custody. Due process attaches when litigation threatens a parent's right to child custody, whether the litigation is commenced by the State, as in *Stanley*, or by a private party, as in *May*.

In *Stanley,* this Court recognized the natural father's keen interest in the children he had sired and raised. The Court stated:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." (Citations omitted.) 405 U.S. at 651, 92 S.Ct. at 1212.

In *Boddie* v. *Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 1971, this Court, recognizing the basic position of the marriage relationship in society, held that due process of law prohibits a State from denying access to its courts to indigents seeking dissolution of marriage solely because of their inability to pay court fees. This Honorable Court speaking through Mr. Justice Harlan stated:

> "No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." (Citations omitted.) 401 U.S. at 379-380, 91 S.Ct. at 787.

The Court continued:

> "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because *it operates to foreclose a particular party's opportunity to be heard.* The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can

> be characterized as due." (Emphasis added.) 401 U.S. at 380, 91 S.Ct. at 787.

In *Wisconsin* v. *Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, 1972, this Court held, through Mr. Chief Justice Burger, that the First and Fourteenth Amendments prevent a State from compelling Amish parents to cause their children to attend high school to age sixteen. In discussing the child's rights, the Court stated:

> "As the child has no other effective forum, it is in this litigation that his rights should be considered." 406 U.S. at 240, 92 S.Ct. at 1546.

Ford v. *Ford,* 371 U.S. 187, 83 S.Ct. 273, 1962 involved a contested custody proceeding. In recognizing the difficulty of presenting to the court the children's best interests, the Supreme Court stated per Mr. Justice Black:

> "Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice." 371 U.S. at 218, 83 S.Ct. at 277.

There is a substantial and widespread trend across the United States advocating independent counsel to represent the minor child's best interests in custody proceedings. Numerous books have been written and articles have appeared in legal periodicals by the leading family law scholars and practitioners explaining the need for an independent advocate to present a true and accurate picture of the child's best interests to the court.

The basic premise revolves around the fact that "children in divorce are always disadvantaged parties" *Kritzik*

v. *Kritzik*, 21 Wis.2d 442, 448, 124 N.W.2d 581, 585, 1963, whether in an adoption or custody proceeding. Of course in the former, the gravity of the judicial determination is forever lasting and by far results in the most serious deprivation. In line with the growing trend, either through legislation or judicial decisions, a number of States have followed the procedure of appointing a law guardian *ad litem* in custody and adoption cases to protect a child's interests.

The two leading authorities and authors in the area of family law, Professor Henry H. Foster, Jr. and Dr. Doris Jonas Freed, have written extensively on the subject of recognition of the legal rights of children. In their article, A BILL OF RIGHTS FOR CHILDREN, 6 ABA Family Law Quarterly, 343, 1972 (Also appearing in the N.Y.L.J., July 28, August 25, and September 22, 1972 and in Katz, *The Youngest Minority; Lawyers in Defense of Children*, 1974 American Bar Association Press), the authors begin with the proposition:

> "Children are *persons* and the law should recognize that fact, although it will take some doing. The status of minority is the last legal relic of feudalism and the arguments for and against perpetuation of that status have a familiar ring. In good measure they are the same arguments that were advanced over the issues of slavery and the emancipation of married women." 6 ABA Family L.Q. at 343.

Foster and Freed then acknowledge that the decision of *In Re*: *Gault, supra*, was indeed the most significant court decision relevant to their philosophical base that a child "should not be treated as an object or a thing" but "should receive legal protection and representation". 6 ABA Family L.Q. at 345. The authors state:

> "It took *Gault* to dispel hypocrisy about juvenile justice. The decision forces us to look at what is being done. In addition to *Gault* and its implications there is *Loving* v. *Virginia*, (388 U.S. 1, 1967). If the matter of the relationship is constitutionally protected from unreasonable state regulation, the parent-child relationship may enjoy similar, albeit more limited, advantage." 6 ABA Family L.Q. at 346.

Finally, Foster and Freed propose a "Bill of Rights for Children" to insure to children that they will be treated as human beings and will receive the constitutional rights and protection that adults enjoy.[2] The premise behind the principles is "that children are people; they are entitled to assert individual interests in their own right,

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2. A BILL OF RIGHTS FOR CHILDREN A child has a moral right and should have a legal right:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;

2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;

3. To be regarded as a *person*, within the family, at school, and before the law;

4. To receive fair treatment from all in authority;

5. To be heard and listened to;

6. To earn and keep his own earnings;

7. To seek and obtain medical care and treatment and counselling;

8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority;

9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and

10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.

to have a fair consideration given to their claims, and to have their best interests judged in terms of pragmatic consequences." 6 ABA Family L.Q. at 346.

Professor Foster in his book entitled A BILL OF RIGHTS FOR CHILDREN (American Lectures in Behavioral Sciences and Law, Charles C. Thomas, publisher, 1974) extensively discussed children's rights. In recognizing their need for independent representation by counsel, Foster states:

> "Assuming that the American adversary system is likely to survive, this matter of independent representation by counsel, so that children have their own lawyer when their placement or welfare is at stake, may be the most significant and practical device for the presentation of their point of view. Proponents of the adversary process should not object to making the system functional so that all interests may be heard.
>
> Children have individual interests apart from and sometimes in conflict with parental or societal interests. Their interests are entitled to be heard and that can be done only through independent representation. Counsel for either parent owes a paramount duty to his client and cannot and should not be relied upon to promote the best interests of children unless they coincide with those of his client. Moreover, busy courts faced with a backload of cases do not have the time or usually the inclination to sort out the evidence and the issues from the child's point of view.
>
> Placement of the child, whether the issue arises in a custody, adoption, or neglect proceeding, is a a matter of crucial importance to him. Quite literally, his life and future are at stake. The consequences of an ill-advised placement may be as traumatic or

> dire as commitment to an institution. The same reasons that justify the extension of due process principles to delinquency proceedings also apply to the placement issue and in truth the need for independent counsel may be even greater because only about twenty percent of juveniles found to be delinquents are institutionalized." Foster, A BILL OF RIGHTS FOR CHILDREN at 44-45.

The State of Wisconsin has been a forerunner in the development of a right to counsel for children in its divorce cases. By court decision, a guardian *ad litem* may be appointed to represent minor children when their parents seek a divorce. In *Wendland* v. *Wendland,* 29 Wis.2d 145, 138 N.W.2d 185, 1965, the Supreme Court of Wisconsin faced the issue of representation of a guardian *ad litem* for children in a fight over custody in a divorce proceeding. The Court in recognizing that children in a divorce are always disadvantaged parties stated:

> ". . . a guardian *ad litem* for the children, as an advocate for their interests, may well be in a position to conduct a further investigation and present evidence to the court that will help it reach its custody determination. . . Where there is a hotly contested dispute, and the court is satisfied that the procedure of relying on the two parties and the investigation of a welfare agency may not produce all the important evidence that the court should consider in looking after the best interests of the children, a guardian *ad litem* should be appointed." 138 N.W.2d at 191.

In *Dees* v. *Dees,* 41 Wis.2d 435, 164 N.W.2d 282, 1969, the Supreme Court of Wisconsin in another custody case reaffirmed the importance of appointing a guardian *ad litem* to determine what disposition and what conditions would best serve the interests of the children. The case

was reversed and remanded for a new hearing with the direction that a guardian *ad litem* be appointed to represent and speak for the best interests of the child; the costs of the guardian to be borne by the parents on an equitable division.

In the case of *Gochenaur* v. *Gochenaur*, 45 Wis.2d 8, 172 N.W.2d 6, 1969, the Supreme Court of Wisconsin, in another custody proceeding, reversed and remanded the cause with directions to the trial court to appoint a guardian *ad litem* to represent and speak for the best interests of the three children involved. The Court stated:

> "We deem the appointment of a guardian *ad litem* especially appropriate in a case such as this where the parties may not fully present the factors which will best serve the children's present and future well-being." 45 Wis.2d 8, 172 N.W.2d at 12.

Prior to 1971, a number of bills were presented to the Wisconsin legislature which would have mandated the appointment of a guardian *ad litem* for children in divorce proceedings, but none of these bills were adopted. The Supreme Court, therefore, invoked its rule-making power and, effective July 1, 1971, it created a statutory section which provides as follows:

> "In any action for an annulment, divorce, legal separation, or otherwise affecting marriage, when the court has reason for special concern as to the future welfare of the minor children, the court shall appoint a guardian *ad litem* to represent such children. If a guardian *ad litem* is appointed, the court *shall* direct either or both parties to pay the fee of the guardian *ad litem*, the amount of which fee shall be approved by the court. In the event of indigency on the part of both parties the court, in its discretion, may direct that the fee of the guardian *ad litem* be paid by the county of venue." (Emphasis added.) WIS. STAT. Sec. 247.045, 1971.

Since this enactment the Supreme Court of Wisconsin has repeatedly and consistently endorsed the procedure of appointing a guardian *ad litem* to represent children in custody matters. See *Molloy* v. *Molloy*, 46 Wis.2d 682, 176 N.W.2d 292, 1970; *Pfiefer* v. *Pfiefer*, 52 Wis.2d 417, 215 N.W.2d 419, 1974; and *Mawhinney* v. *Mawhinney*, 66 Wis.2d 679, 225 N.W.2d 501, 1975.

Judge Robert W. Hansen, Family Court Judge in Milwaukee, Wisconsin has instituted in his court a procedure for appointment of guardians *ad litem* in *all* cases where child custody is in dispute. (See Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of a Child's Interests*, 4 JOURNAL OF FAMILY LAW, 181, 1964, and Hansen, *The Role and Rights of Children in Divorce Actions*, 6 JOURNAL OF FAMILY LAW 1, 1966). The Judge writes:

> "When two terriers fight over a bone, the bone does not join the fighting. But a child is not a thing or an object to go as a prize to the winner of a contest. It is a precious, unique, individually human being. The whole future life of the child will be affected by the court's decision in the matter of custody . . . If a child's rights to damages for injuries sustained in an accident are to come before a court, a guardian *ad litem* must be appointed before a trial can be had or a settlement approved by the court. If it appears that children, known or unknown, may have an interest in the estate of a deceased person, the probate court appoints a guardian *ad litem* to represent the interests of such possible heirs. Is not a minor and dependent child whose parents are involved in a di-

vorce case entitled to similar representation, at least in those cases in which custody becomes a matter of dispute between the parties or concern to the court?" Hansen, *supra* at 181-182.

In Milwaukee, the child's due process rights are protected by the guardian *ad litem* representing the child. The guardian *ad litem* participates in a hearing with the same rights and opportunities as counsel for the parties. He may subpoena, present testimony of witnesses and cross-examine the parties or witnesses testifying on behalf of either party. Finally, he is requested to make a statement or recommendation on behalf of the children at the conclusion of the taking of testimony.

In an action involving custody of a foster child, the Pennsylvania Appellate Court was particularly concerned over the trial court's stance that evidence regarding the child's best interests was not relevant. *Stapleton* v. *Dauphin County Child Care Service*, 228 Pa. Super. 371, 324 A.2d 562, Super Ct. Pa. 1974. The Court stated:

> "To say that a child is merely the subject of the proceeding, not a 'party' to it, would be to return to the child-as-chattel mentality. (Part II, *supra.*) Brent is just as much a party to this case, which will determine his future, as he would be if he were seventeen years old and charged with shoplifting and the proceeding were a delinquency proceeding.
>
> Nor can anyone waive Brent's right to counsel. The purpose of the hearing will be to determine what is in his best interest. To confer power to waive counsel, whether on the Lietzels, the Stapletons, or the Child Care Service would be to prejudge the case, since it would amount to a determination that that party's interests were in accord with Brent's best interests." 324 A.2d at 573.

In *Barth* v. *Barth*, 225 N.E.2d 866, Ct.C.P. Ohio, 1967, the Court stated that the appointment of a guardian *ad litem* to represent minor children in a divorce action was a novel concept in the State of Ohio. The Court acknowledged the progress in this area by the State of Wisconsin in stating that the interests of the minor children may be substantially different from either or both parents. The Court stated:

> "A child, by definition, is inherently unequal in a contest based upon a system of law—the adversary process—that contemplates a contest of reasonably equal parties." 225 N.E.2d at 867.

In finding that the *Barth* case was one wherein the children needed protection beyond that which could be given by either or both parents, the Court stated:

> "It is precisely for this purpose that the procedure of Guardian *Ad Litem* was conceived and is to be executed." 225 N.E.2d at 867.

The State of Alaska in *Carle* v. *Carle*, 503 P.2d 1050, 1972, has recognized the need for independent protection of the child's best interests by appointment of a guardian *ad litem* in custody determinations.

Two authors state that when spouses obtain a divorce, important interests of the children may suffer harm. See Kleinfield and Moss, *A Divorce Reform Act*, 5 HARVARD JOURNAL ON LEGISLATION, 563, 1968. In noting that these interests are usually not represented at the divorce, they state:

> ". . . the legal principles and policies for parties who intervene as of right and for necessary or indispensible parties should be applied to children whose parents seek divorce." Kleinfield and Moss, *supra*, at 574.

The authors continue:

> "Th considerations discussed above warrant the proposition that children ought to be parties, separately represented to assert their interests, when their parents seek divorces. . . . Neither parent's interests coincide with the child's, and both may have interests at odds with the child's; therefore, representation of the child cannot safely be left to the parents." Kleinfield and Moss, *supra,* at 577.

In concluding that the "palisade between children and the divorce court is inconsistent, not only with general principles of law regarding representation of third parties, but also with rules on representation of children and rules on representation of third parties in divorce," (p. 578) the authors propose a Divorce Reform Act that would give children representation. The proposed Act would require the court to appoint lawyers for all minor children of the spouses to a divorce. See Kleinfield and Moss, *supra,* at 582-583.

In an article appearing in the June-July, 1969 issue of TRIAL MAGAZINE, *Divorce Today: Fraud on Family and Society* by Lee Allen Hawke, the author observes that our system of justice allows either or both spouses to have his or her interests protected by a trained attorney in a divorce action. Hawke notes:

> "If all interests are weighed, it is probable that the children have a greater interest and yet less protection in the divorce courts than the husband, wife or society." Hawke, *supra,* at 36.

In suggesting a plan that would give children representation, the author proposes a plan that would allow guardians *ad litem* to be appointed for the children. Hawke, *supra,* at 37.

A professor of law and professor of psychiatry at the University of Michigan suggests:

> "A procedure must be established which assures that the child's interests are effectively advocated during the divorce proceedings. Because of this author's skepticism regarding the ethical commitments of the parties' counsel, it must be secured by appointing, for the child, counsel who will skillfully and tactfully represent his interests." See Watson, *The Children of Armageddon: Problems of Custody Following Divorce,* 21 SYC. L. REV. 55, 77, 1969.

Father Robert F. Drinan, former dean of Boston College of Law School and currently United States Congressman, in analyzing whether children are third-party beneficiaries of marriage contracts, advocates the protection of children's interests in divorce proceedings. Father Drinan states:

> "Basic due process means that the rights which are vested in a child by his birth, by the type and quality of the family into which he is born, and by a thousand other factors cannot in justice be disregarded because of the mistakes, selfishness, or even by the exercise of the best judgment of one or both of his parents. If a concept of pre-existing rights means anything, it means that there are certain fixed moral and legal relationships which give rise to inherent expectations, the frustration of which is shocking to everyone's sense of justice." See Drinan, *The Rights of Children Whose Parents are Divorced,* 1962 UNIVERSITY OF ILL. L.F. 618, also appearing in Newman, *Children in the Courts—The Question of Representation,* INSTITUTE OF CONTINUING LEGAL EDUCATION, Ann Arbor, 74, 85, 1967.

The United Nations in its Declaration of the Rights of the Child has established the right to appropriate legal protection for the child before as well as after birth. See *Declaration of the Rights of the Child,* UNITED NATIONS REVIEW, December 1959, page 88.

The preamble includes:

"*Whereas* the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,"

and Principle 2 provides:

"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

Principle 6 includes the sentence:

"(The child) shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

Another author, former probate and juvenile court judge, Donald T. Anderson, observes:

"There is much to be said for the right afforded in the adversary system for every interested party to present and argue his case, and this right must be preserved. The problems arise when there are actually parties in interest who cannot in reality exercise this right. Children of divorce are classic examples." Anderson, *Safeguarding Children of Divorce in a Unified Court System*, in Newman, *supra*, 59, 60.

Anderson continues:

"Lacking an advocate, the child loses by default in a system effectively operative for resolving disputes

between essentially equal adversaries." Anderson, *supra*, in Newman, *supra*, at 61.

For further discussion of a child's right to counsel in divorce proceedings, see: Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L.REV. 103, 1973; Speca and Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U.M.K.C. L.REV. 1, 1969; and Inker and Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229, 1970, also appearing in 5 ABA FAMILY L.Q. 108, 1971.

The distinction between custody and adoption proceedings is of extreme significance. What is involved in the instant petition is more than a mere temporary change in custody with the court always retaining jurisdiction to change custody in the future upon showing of the natural parent's changed circumstances. Much deeper and broader considerations are commanded in adoption proceedings. An adoption proceeding is no less than a final one-shot determination of whether a permanent and irreversible severance of the parent-child relationship will occur. Indeed such a proceeding bears the greatest consequences for the child as well as its natural parent.

It is respectfully submitted that basic due process safeguards must be applied in contested adoption proceedings so that the best interests of the child which are of paramount consideration, are adequately and properly presented to the court independent of the other parties to the adoption. The serious nature of the adoption proceedings with the substantial deprivations which follow necessitate the appointment of independent counsel in the form of a law guardian *ad litem* to adequately represent the child's interests before the court. More than any other right guaranteed by the Bill of Rights regarding the func-

tion of justice, right to counsel is paramount, for it is the medium through which all of the guarantees are made reality. *Steadman* v. *Duff,* 302 F.Supp. 313 (D.C. Fla. 1969).

A number of jurisdictions have seen fit to protect the child's constitutional due process rights to representation by independent counsel. The State of Missouri, by Statute, provides for the appointment of guardians *ad litem* for all children involved in adoption proceedings. The statute provides in pertinent part:

> "The court shall, in all cases where the person sought to be adopted is under the age of twenty-one years, appoint a guardian *ad litem* to represent in said proceedings the person sought to be adopted. . . ." Vernon's Ann. Mo. Stat., Sec. 453.020, 1959.

In *In Re*: *G,* 389 S.W.2d 63, Mo. App., 1965, involving a contested adoption, the Court analyzed the duties of a guardian *ad litem.* The Court stated:

> "The appointment and service of a guardian *ad litem* is not a mere technical formality. The person so appointed is not a mere 'figurehead'. It is his duty to protect the interests of the child. He should not waive or give up anything which affects the interest of his ward." 389 S.W.2d at 66.

The Court continued:

> "In an adoption proceeding both the child and the state are interested parties. 2 C.J.S. Adoption of Children, Sec. 36, note 59 PP.; See *State ex rel. Earnest* v. *Meriwether,* Mo., 270 S.W.2d 20, 22. And it is obvious that the appointment of an attorney representing a party who seeks to terminate the child's physical and legal relationship with a parent is improper. The person so appointed should be in a position to represent the best interests of the child and to fairly advise

> the court. If he has an axe to grind in that he is employed to represent the petitioner for adoption, he should not be appointed. See *Sargeant* v. *Rowsey,* 89 Mo. 617, 1 S.W. 823, 824." 389 S.W.2d at 66.

The United States Court of Appeals for the District of Columbia, in *Barnes* v. *Paanakker,* 111 F.2d 193, 1940, was, as in the instant case, faced with an attempted stepfather's adoption contested by the natural father. In recognizing the gravity of the final judicial determination Judge Vinson stated:

> "When the adoption of a child is sought, a decision ordering or denying the same affects the lives of the child, his natural parent, and his prospective adoptive parents. Rights of custody, control, and inheritance are affected. To say that a decision ordering or denying an adoption is fraught with deep and serious social significance is but to state the obvious. Despite its significance, older adoption statutes provided few procedural safeguards for the interests of the child whose adoption was sought." 111 F.2d at 196.

The Court then went on to consider whether the adoptee's best interests were fully before the court. The Court stated:

> "Neither failure of counsel to raise the point on appeal, nor the fact that no decree of adoption was entered, relieves us of this responsibility, for decision on a petition for adoption may properly be made by the District Court only after it has brought the interests of the adoptee fully before it." 111 F.2d at 196.

The Court continued:

> "For that full measure of representation and protection envisaged by the act, one legally capable of representing their interests must appear in the proceedings." 111 F.2d at 197.

The Court found that the natural father failed to adequately protect the prospective adoptee's interests. As no one legally capable of representing the interests of the prospective adoptees was before the court, the court concluded:

> "The interests of these adoptees were not, therefore, brought fully before the court." 111 F.2d at 198.

Therefore, the court of appeals reversed and remanded to the trial court with instructions to appoint a guardian *ad litem* for the prospective adoptees to bring their interests fully before the Court.

In *In Re*: *Adoption of Children*, 96 N.J.Super. 415, 233 A.2d 188, 1967, *supra*, the Court, as in *Barnes, supra*, faced another situation factually similar to the instant case. The stepfather of two children, ages seven (7) and three (3), sought to adopt and the natural father contested the proceedings.

In exercising restraint in cutting off the natural link between parent and child, the court noted:

> "The right of a natural parent to its child must be included with the bundle of rights associated with marriage, establishing a home and rearing children; as such, it should be viewed as 'so rooted in the tradition and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, 677, 90 A.L.R. 575, 579, 1934, approvingly quoted in *Griswold* v. *Commonwealth of Connecticut*, 381 U.S. 479, 487, 85 S.Ct. 1678, 14 L.Ed.2d 510, 517 (1965) (Goldberg, J., concurring). Note also, id, 381 U.S. at pp. 495-496, 85 S.Ct. at pp. 1687-1688, 14 L.Ed.2d at p. 522. The Fourteenth Amendment's concept of substantive due process protects the parent-child relationship from unwarranted

> governmental intrusion. See *Meyer* v. *State of Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042, 1045 (1923); *Pierce* v. *Society of the Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070, 1078 (1925); *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645, 652, rehearing denied 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090 (1944); *Lacher* v. *Venus*, 177 Wis. 558, 188 N.W. 613, 617, 24 A.L.R. 403, 408-410 (S.Ct. 1922). The amendment is also construed to protect the right of a natural parent to procedural due process when the custody or adoption of its child is being litigated. See *May* v. *Anderson*, 345 U.S. 528, 533-534, 73 S.Ct. 840, 97 L.Ed. 1221, 1226-1227 (1953); *Armstrong* v. *Manzo*, 380 U.S. 545, 550-551, 85 S.Ct. 1187, 14 L.Ed.2d 62, 66 (1965)."

In reversing and remanding the trial court's final judgment of adoption for its failure to clearly find that the adoption was in the children's best interests, the court recognized the need for a guardian *ad litem*, citing *Barnes, supra, Barth, supra*, and *Wendland, supra*.

Adoption of Lord, 28 A.D.2d 1203, 288 N.Y.Supp.2d 25 (App. Div. 1967), recognized the seriousness of matters of evasion, withholding information from the court and failure to disclose in an open and fair manner all material facts in an adoption proceeding. The Court stated:

> "In a proceeding of this type full and complete disclosure of all material facts is required." 288 N.Y. Supp.2d at 26.

In reversing and remanding, the court concluded:

> ". . . in all matters relating to the future adoption proceedings, there should be a guardian *ad litem* appointed to protect the interests of the infant." 288 N.Y.Supp.2d at 26.

Professor Coyne in his article, *Who Will Speak For the Child?*, 383 Annals of the American Academy of Political and Social Science 34, 46-47, 1969, summarized the matter well:

> "Legal change typically lags far behind social change. Our legal machinery in custody proceedings is not functioning as it should. The innovation of the juvenile court was doubtless an improvement. It allowed the law to treat children differently from adults. Recognition was given to the vulnerability of youth. But the broad grant of discretion to judges prevented the proceedings from being truly adversary.
>
> Although the law is aware that a child needs his own special forum, the law has not as yet been able to see that a child really is a person in custody matters, that he has rights of his own, and that he needs his own advocate."

During the last two decades, great progress has been made in the recognition, protection and equalization of the rights of racial minorities and of women. Is it not now time for the courts to recognize that the youngest minority should receive equal treatment and protection before the law, even before the age of majority?

CONCLUSION

For the foregoing reasons, we respectfully petition this Court to issue its Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX

IN THE
CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

NO. 73-2006 "J" Seay

IN RE: PETITION OF
CHARLES FREDERICK HARDY

Final Judgment of Adoption

This cause came on to be heard upon the verified Petition for Adoption of CHARLES FREDERICK HARDY and the consent of his wife, JANINE S. HARDY, the natural mother of the minor children sought to be adopted and the Court having heard testimony from the Petitioner and his witnesses and having heard testimony from the Respondent, GARY JAMES KNOSTMAN, the natural father of the children sought to be adopted and having heard argument of counsel for the Petitioner and being otherwise duly advised the Court finds and decides as follows:

1. That the testimony has clearly indicated that the adoption would be in the best interests of the minor children, STEPHANIE SNYDER KNOSTMAN and JACK ALLAN KNOSTMAN.

2. That the course of conduct of the Respondent, GARY JAMES KNOSTMAN, has indicated his intent to forego his parental duties as shown by his actions in failure to provide support for the minor children sought to be

adopted as well as his failing to exercise any visitation privileges since August of 1971, and despite, the Respondent's verbally professing otherwise, his actions constitute a disinterest in the minor children amounting to constructive abandonment.

3. The Petitioner, CHARLES FREDERICK HARDY, has shown to the Court that he is a fit and proper person to adopt the minor children and that he enjoys a good marital relationship with the natural mother of the minor children, has provided a wholesome home and the Court feels that the emotional, social and financial security that the Petitioner has provided and will in the future provide for the minor children is excellent and the best interests of the children would be served by granting the Petition.

THEREFORE, it is

ORDERED AND ADJUDGED

A. That the minor child known as STEPHANIE SNYDER KNOSTMAN and the minor child known as JACK ALLAN KNOSTMAN are declared to be the legal children of the Petitioner, CHARLES FREDERICK HARDY.

B. That the child known as STEPHANIE SNYDER KNOSTMAN is given the name of STEPHANIE SNYDER HARDY, and the child known as JACK ALLAN KNOSTMAN is given the name of JACK ALLAN HARDY, by which names the minor children shall hereafter be known.

C. That the said children shall be the children and legal heirs of the Petitioner, CHARLES FREDERICK HARDY, entitled to all of the rights and privileges, and subject to all obligations of children born to Petitioner, CHARLES FREDERICK HARDY, in lawful wedlock.

DONE AND ORDERED in Chambers Broward County Courthouse, Fort Lauderdale, Florida, this 8 day of June, 1973.

Russell E. Seay, Jr.
Circuit Judge

copies furnished

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299 So.2d 172

PETITION OF CHARLES FREDERICK HARDY.

No. 73-811.

District Court of Appeal of Florida,
Fourth District.

Aug. 2, 1974.

Rehearing Denied Sept. 12, 1974.

Appeal from Circuit Court, Broward County; Russell E. Seay, Jr., Judge.

PER CURIAM.

Affirmed.

312 So.2d 751

PETITION OF CHARLES FREDERICK HARDY.

No. 46337.

Supreme Court of Florida.

April 18, 1975.

Certiorari denied. 299 So.2d 172.

ADKINS, C. J., and ROBERTS, McCAIN, OVERTON and ENGLAND, JJ., concur.